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*Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society*

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Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr. Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



## Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

## **ABOUT US**

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# PATENT MISUSE IN THE TECHNOLOGY INDUSTRY: A CRITIQUE

**Keywords:** *Intellectual property Rights, Patent, Technology, Patent Misuse, Patent Regulations*

AUTHORED BY - TARUN SHARMA

LLM (IPR)

HNLU RAIPUR

7003515388

[TARUN180717@GMAIL.COM](mailto:TARUN180717@GMAIL.COM)

*This research paper provides a critical analysis of patent misuse within the technology industry. Patents play a vital role in promoting innovation and protecting the rights of inventors. However, concerns have been raised regarding the potential for patent misuse, particularly in the dynamic and fast-paced technology sector. The purpose of this study is to examine the concept of patent misuse and evaluate its implications within the technology industry. The paper begins by exploring the definition and scope of patent misuse, highlighting its various forms and manifestations.*

*Next, this paper defines why patent-responsible use is the need of the hour and how to patent misuse has economic and societal impacts on the technology industry. It examines how patent trolls and non-practicing entities exploit patents for litigation purposes, diverting resources away from productive innovation. The consequences of patent misuse on market competition, consumer welfare, and overall industry growth are examined in detail. Furthermore, this research paper critiques the existing legal framework and regulatory mechanisms governing patent misuse. It analyses the effectiveness of current laws and policies in deterring and addressing patent misuse in the technology industry. Finally, the study concludes by proposing recommendations to mitigate patent misuse and foster a more balanced and innovation-friendly environment within the technology industry. These recommendations encompass both legislative reforms and industry practices to promote fair and responsible patent use, discourage abusive behaviour, and enhance competition and innovation.*

*Through a comprehensive examination of patent misuse in the technology industry, this research paper aims to contribute to the ongoing discourse on intellectual property rights and innovation*

*policy. It provides valuable insights for policymakers, legal practitioners, industry stakeholders, and researchers concerned with striking the right balance between patent protection and fostering a competitive and thriving technology ecosystem.*

## INTRODUCTION

The concept of patents can be traced back to ancient civilizations such as Greece, Rome, and China, wherein innovators received temporary exclusive rights to use their inventions. Consider how, during the time of the Ancient Greeks, Archimedes' creation of a water screw for irrigation was awarded patent-like safeguards by the King of Syracuse<sup>1</sup>. Similarly, in ancient Rome, there were no official patents, but there were laws and practices in place to protect inventors and their creations. For example, the Roman Senate granted a monopoly to a particular glassmaker in the 1st century AD, allowing him exclusive rights to produce and sell glass in Rome<sup>2</sup>. However, the modern concept of patents began to take shape in Europe in the 15th century, with the development of the printing press and the need to protect the rights of inventors and publishers. The first recorded patent in history was granted in Venice in 1474 to a glassmaker, for a new method of making eyeglasses<sup>3</sup>. This was followed by other European countries, such as England and France, introducing their own patent laws in the 17th century.

India's first patent law was enacted in 1856 by the British colonial government<sup>4</sup>. After India gained independence in 1947, the Indian government realized the importance of patent protection for the country's economic growth. In 2005, India further amended its patent law to comply with the TRIPS requirement that patent protection is to be extended to 20 years from the filing date. The law also allowed for the grant of compulsory licenses in certain circumstances, such as public health emergencies. The problem of patent misuse in the technology industry is crucial to study due to its impact on innovation and competition. Patent misuse can result in higher costs, limited consumer choice, and stifled technological advancements. It is important to understand the legal and ethical issues surrounding patent misuse to promote a fair and competitive market for technological innovation.

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<sup>1</sup> Waddell E, 'A Brief History of Patents' (CSY, 24 February 2021) <<https://csy-ip.com/a-brief-history-of-patents/>> accessed 26 June 2023

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> (Official website of Intellectual Property India) <<https://ipindia.gov.in/history-of-indian-patent-system.htm>> accessed 26 June 2023

# CONTENTIONS FOR PROMOTING RESPONSIBLE PATENT USAGE

Supporters of eliminating patent misuse argue that the current approach taken by the Federal Circuit severely limits the effectiveness of the misuse doctrine in curbing abusive patent practices<sup>5</sup>. Under this approach, any actions by patent owners that do not meet the strict anticompetitive effects/antitrust standard, even if they grant rights beyond the scope of the patent itself, remain unchallenged. Recent events have shown that patent owners are going beyond seeking returns from products or services that fall outside the patent claims or extend beyond the patent's expiration. They are disrupting industry standards, engaging in reverse settlement payments, impeding others' productive activities, imposing restrictive licensing terms in the medical field, and hindering innovation. Attempts to address these issues through antitrust law have been consistently rejected by the courts due to the absence of provable anticompetitive effects<sup>6</sup>. This suggests that the heightened misuse standard set by the Federal Circuit creates a significant enforcement gap. In the current legal landscape, it is not enough to argue that misuse prevents patent owners from imposing costs on others. It is crucial to determine whether the challenged actions result in net harm to the overall system.

Furthermore, pursuing misuse claims incurs substantial costs in terms of litigation, discovery, and appeals, even though they are rarely upheld<sup>7</sup>. These expenses, along with the blanket unenforceability sanction, impose significant social costs and discourage patent access. To justify the existence of the misuse doctrine, it must demonstrate unique overall benefits.

## **PATENT MISUSE: - DEBRISING THE PRINCIPLES**

The phrase "patent misuse" refers to several categories of illegal conduct carried out by the holder of the patent. The affirmative defense of "patent misuse" acknowledges that a patent owner may misuse the exclusive privilege they have as a consequence of the grant of a patent. Patent abuse cannot be used as a weapon in an affirmative defense rather, an alleged infringer may only raise it once the patent owner files a lawsuit to enforce the patent's exclusive right. After the patent infringement lawsuit has been filed, the accused infringer must prove that the patentee has

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<sup>5</sup>Federal Circuit's en banc decision in *Princo*, 616 F.3d 1318

<sup>6</sup> Ark. Carpenters Health and Welfare Fund, Paper, A.F. of L. v. Bayer AG (In re Ciprofloxacin), 604 F.3d 98 (2d Cir. 2010)

<sup>7</sup> USM Corp. v. SPS Technologies, Inc., 694 F.2d 505, 512 (7th Cir. 1982)

unlawfully enlarged the 'physical or temporal scope' of the patent grant with unfair competition consequence in order to effectively rely on the patent abuse defense. The patent will not be enforced even if it is legitimate if the accused infringement can show that the patent holder participated in illegal activity. The notion of inequitable behaviour, which similarly serves to render the entirety of a patent invalid, and patent abuse are comparable in this regard.

The first instance of patent abuse was in the case of *Adams v Burke*<sup>8</sup> The court ruled that the patentee loses all monopoly rights over a product when the patentee makes its first approved sale of the device, making the product the full property of the buyer. The product is transferred with the same rights to subsequent owners, who may use it in the same manner as the original owner. The doctrine of exhaustion was developed out of this case.

Patent misuse was first acknowledged as a legitimate claim by the US Supreme Court in the case of *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*<sup>9</sup> According to the ruling of the court, a patent does not provide its owner the right to limit the use of licensed items that use its patented process. Although in later laws, Supreme Court rulings, and judgments from the Court of Appeals for the Federal Circuit have changed the basis of the claim, this established patent abuse as an affirmative defense to patent infringement.

The court in the case of *Princo Corp. v. International Trade Commission and U.S. Philips Corp.*<sup>10</sup> held that "the defense of patent misuse is not available to a presumptive infringer simply because a patentee engages in some kind of wrongful commercial conduct." The United States Supreme Court supported the legality of licensing the use of tied or other related items together with the initially patented product in the well-known case of *Henry v. A.B. Dick Co.*<sup>11</sup> the Inherency Doctrine which evolved in this case, as it is commonly referred to as, holds that a patent owner has the inherent right to use his right to license his product on any terms and conditions he chooses, rather than having exclusive rights over it.

Also, in the case of *Brulotte v. Thys Co.*<sup>12</sup> the US Supreme Court held that it is abuse of a patent for a party to seek royalties beyond the expiration of the patent. The court also laid down a test

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<sup>8</sup> *Adams v. Burke*, 84 U.S. 17 Wall. 453 453 (1873)

<sup>9</sup> *Motion Picture Patents Co. v. Universal Film Manufacturing Co* 43 U.S. 502 (1917)

<sup>10</sup> *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318 (Fed. Cir. 2010)

<sup>11</sup> *Henry v. A.B. Dick Co.*, 224 F.2d 195 (9th Cir. 1955)

<sup>12</sup> *Brulotte v. Thys Co.*, 379 U.S. 29 (1964)

for a condition when a business accuses a patent owner of misusing their rights, then the claim must meet two requirements:

- I. The legal patent was employed to alter the results of corporate operations.
- II. The anti-competitive impacts went beyond what the patent covered.

## **PATENT MISUSE CLAIM**

A patent misuse claim is a legal defense raised by a defendant in a patent infringement lawsuit. It alleges that the plaintiff, who owns the patent, has engaged in anticompetitive behaviour by using the patent in a way that exceeds the scope of the patent's legal protection.

Examples of patent misuse include:

- I. Tying: The patent owner requires the licensee to purchase additional products or services in addition to the patented product as a condition of obtaining the license.
- II. Price fixing: The patent owner sets the price of the patented product or service higher than it would be in a competitive market.
- III. Refusal to license: The patent owner refuses to license the patent to a potential licensee who competes with the patent owner, thereby limiting competition.

If a court finds that the patent owner has engaged in patent misuse, it may refuse to enforce the patent or limit its legal protection. This can result in the patent becoming less valuable or even invalid.

## **DIFFERENT TYPES OF PATENT MISUSE PRACTICES**

- I. A patent holder may misuse their patent in one of three ways:
- II. The holder or owner of the patent violates the antitrust laws.
- III. Bad or malicious intent of the patent owner or holder
- IV. wilfully broadens the patent's claims or its scope.

In order to remind patent owners of their rights, Kaufman & Canoles<sup>13</sup> defined what patent abuse is not. Misuse of a patent does not include:

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<sup>13</sup>What Does and Does Not Constitute Patent Misuse &gt; Intellectual Property & Franchising Law &gt; Blog &gt; Kaufman & Canoles' (Kaufman & Canoles, 12 November 2018) &lt;<https://www.kaufcan.com/blog/intellectual-property-and-franchising-law/what-does-and-does-not-constitute-patent-misuse/&gt;> accessed 26 June 2023

- I. Protection of a patent from infringement
- II. refusing to provide a patent license to a certain person
- III. A patent license that comes with a requirement that the purchaser additionally purchase another good or patent license
- IV. using one's own creation in a way that encourages patent infringement by third parties

Patent misuse refers to the improper use of a patent, such as using it to stifle competition or gain an unfair advantage in the market. In the technology industry, patent misuse can occur in several ways, such as:

- Patent Trolling: Patent trolls are companies or individuals who acquire patents with the sole purpose of suing other companies for infringement. They do not produce any products or services but make money by suing others who they believe are infringing on their patents. This practice is seen as abusive and harmful to innovation.

A remarkable case of Patent Trolling in India is *Ericsson v. Micromax*<sup>14</sup> case of 2013. Ericsson, a Swedish multinational telecommunications company, accused Micromax, an Indian smartphone manufacturer, of infringing on several of its standard essential patents related to 2G, 3G, and 4G technologies. Ericsson demanded that Micromax pay a royalty fee for the use of these patents. Some critics of the ruling saw it as an example of patent trolling, as Ericsson was accused of demanding excessive royalty fees for patents that were essential to the mobile phone industry. However, others argued that Ericsson was merely trying to protect its intellectual property rights and that Micromax had no right to use Ericsson's patented technology without paying a royalty fee. Overall, the Ericsson versus Micromax case highlights the complex legal issues surrounding patent infringement and the use of standard essential patents in the technology industry. Micromax initially refused to pay and argued that Ericsson's royalty demands were excessive and unfair. However, in 2014, the Delhi High Court ruled in favor of Ericsson and ordered Micromax to pay a royalty fee of 1.25% on the sale price of its devices that use Ericsson's patents.

- Anti-competitive behaviour: Some companies may use their patents to limit competition by forcing other companies to pay high licensing fees or blocking them from using certain technologies. This can stifle innovation and harm consumers by limiting their choices.

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<sup>14</sup>Ericsson v. Micromax, (2013) 107 DRJ 395 (India)

A landmark case of anti-competitive behaviour in patent in India is Competition Commission of India (CCI) vs. Ericsson India Private Limited<sup>15</sup> (2016): This case involved allegations against Ericsson, a leading mobile phone technology company, of abusing its dominant market position by charging excessive royalty fees for its standard-essential patents (SEPs) for wireless communication standards. The CCI found Ericsson guilty of anti-competitive practices and imposed a penalty of Rs. 1,000 crores (approximately USD 135 million) on the company.

The case was significant as it ratifies the prior judgement in the case of Ericsson v. Micromax which royalty asked by Ericsson was considered by the Delhi HC as reasonable.

- Standard essential patents (SEPs): SEPs are patents that cover technologies that are essential to industry standards. Companies that own SEPs have a responsibility to license them on fair, reasonable, and non-discriminatory (FRAND) terms to ensure that they are used to benefit the industry as a whole. However, some companies may abuse their SEPs by demanding excessive licensing fees or refusing to license them altogether.

A remarkable case of SEPs is *FTC v. Qualcomm Inc.*<sup>16</sup> (2019), in which the Federal Trade Commission (FTC) accused Qualcomm, a leading manufacturer of cellular technology, of engaging in anti-competitive behavior in its licensing practices. Specifically, the FTC alleged that Qualcomm used its dominant market position to charge excessive royalties and exclude competitors from the market. The FTC alleged that Qualcomm violated its obligation to license its SEPs on FRAND terms by charging royalties that were excessive and by refusing to license its patents to competitors. Qualcomm argued that its licensing practices were lawful and that the FTC's case was based on flawed legal and economic theories. Ultimately, the court held that Qualcomm's licensing practices violated antitrust laws. The court found that Qualcomm had used its market power to extract excessive royalties from its customers and to exclude competitors from the market. The court ordered Qualcomm to renegotiate its licensing agreements on FRAND terms and to cease its anti-competitive practices.

- Patent thickets: Patent thickets refer to situations where there are numerous patents covering a particular technology, making it difficult for other companies to enter the market without infringing on those patents. This can lead to a lack of innovation and competition in the industry.

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<sup>15</sup>To Promote and Sustain an Enabling Competition Culture through Engagement and Enforcement That Would Inspire Businesses to Be Fair, Competitive and Innovative; Enhance Consumer Welfare; and Support Economic Growth.' (Competition Commission of India) &lt;<https://www.cci.gov.in/>&gt; accessed 26 June 2023

<sup>16</sup> Federal Trade Commission v. Qualcomm Inc., 411 F. Supp. 3d 658 (N.D. Cal. 2019)

*Lemelson Medical, Education & Research Foundation, LP v. United States*<sup>17</sup> (2005): This case involved Jerome Lemelson, a prolific inventor who had obtained numerous patents related to bar code scanning technology. Lemelson's patents were so broad and numerous that they effectively created a "patent thicket" that made it difficult for others to develop and market competing products. The Lemelson case highlighted the need for patent law to balance the interests of inventors with the need for competition and innovation. It also demonstrated the potential dangers of allowing a single individual or entity to control a large number of patents in a particular technology area.

- Evergreening of Patent: Evergreening of patents refers to the practice of extending the life of a patent by filing for additional patents on minor variations or improvements of the original invention. This practice is often used by pharmaceutical companies to extend their monopolies over specific drugs, even after the original patent has expired.

One of the landmark cases related to the evergreening of patents is *Novartis AG v. Union of India*<sup>18</sup> (2013): In this case, Novartis challenged the Indian Patent Office's decision to reject its application for a patent on a beta-crystalline form of the drug Imatinib Mesylate (sold under the brand name Glivec). The patent was rejected on the grounds that it did not meet the criteria for patentability under Indian law, and that it was an attempt to evergreen the original patent on Imatinib Mesylate. The case went all the way to the Indian Supreme Court, which ultimately upheld the rejection of the patent. The court held that the beta-crystalline form of Imatinib Mesylate was not a new invention, but rather a minor modification of the existing drug. The court also reaffirmed the importance of balancing the interests of patent holders with the public interest in affordable access to essential medicines. The Novartis case was significant in that it established a clear legal framework for assessing the validity of patents on minor modifications or improvements of existing drugs, and reinforced the importance of preventing the evergreening of patents in the pharmaceutical industry.

## EXISTING LEGAL AND POLICY FRAMEWORKS IN PREVENTING PATENT MISUSE

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<sup>17</sup> *Lemelson Medical, Educ. & Research Found. v. United States*, 518 F.3d 1346 (Fed. Cir. 2008)

<sup>18</sup> *Novartis v. UOI*, [2013] 13 S.C.R. 148

The existing legal and policy frameworks in preventing patent misuse are designed to balance the interests of patent holders with the public interest in promoting innovation, competition, and access to essential goods and services. These frameworks are intended to prevent abuses of patent rights, such as the use of patents to stifle competition or to charge excessive prices for essential goods.

In India, the Patents Act, of 1970<sup>19</sup>, contains provisions to prevent patent misuse by the owner. The relevant sections are:

Section 84<sup>20</sup> - This section empowers the Controller General of Patents, Designs and Trademarks to grant compulsory licenses for patents in certain circumstances, such as when the patent owner has refused to grant a license on reasonable terms, or when the patented invention is not being worked in India, after the fulfillment of 3 years from the grant of the patent<sup>21</sup>. The three main grounds on which the Controller General can grant compulsory licencing are:-

1. Reasonable requirement of the public in respect of the patented invention has not been met
2. The patented invention is not available to the public at a reasonable price.
3. That the patented invention has not been working in the territory of India

Section 66<sup>22</sup> - The Central Government has the authority to declare a patent or its implementation harmful to the country or detrimental to the public. If such a declaration is made after allowing the patent holder to present their case, it will be published in the Official Gazette, and as a result, the patent will be considered revoked.

Section 85<sup>23</sup> - allows the Central Government to revoke a patent if it deems the patent or its exercise to be detrimental to the State or prejudicial to the public. The process involves giving the patentee an opportunity to be heard before making a declaration of revocation in the Official Gazette. Once the declaration is published, the patent is considered to be revoked.

The Patent Act of 1970, in its current form, does not contain a specific provision addressing patent misuse. Unlike some other jurisdictions, such as the United States, the Act does not explicitly define or regulate the concept of patent misuse. Patent misuse refers to the improper use or

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<sup>19</sup> The Patent Act, 1970, No. 39, Acts of Parliament, 1970 (India)

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

enforcement of a patent, such as engaging in anti-competitive practices or imposing unreasonable restrictions on the use of patented technology. However, while the Act lacks a direct provision on patent misuse, other provisions of the Act, such as those pertaining to compulsory licensing and revocation, may indirectly address instances of misuse. In such cases, parties may need to rely on general principles of contract and competition law to address potential abuses or improper behaviour related to the exercise of patent rights.

In the United States, the primary law governing patents is the Patent Act, 35 U.S.C. §1 et seq. The relevant sections that address patent misuse by the owner are:

Section 271(d)<sup>24</sup> - This section provides that patent owners cannot use their patents to unreasonably restrain trade or create a monopoly. If a patent owner is found to have misused their patent in this way, they can be held liable for antitrust violations.

Section 282<sup>25</sup> - This section allows anyone to challenge the validity of a patent in court, including on the grounds that the patent owner has engaged in patent misuse.

Section 287<sup>26</sup> - This section limits the damages that a patent owner can recover in a patent infringement lawsuit if they have engaged in certain types of patent misuse.

In the European Union, patent misuse is primarily addressed under Article 101<sup>27</sup> of the Treaty on the Functioning of the European Union (TFEU) and the corresponding provisions of national competition laws. Article 101 of the TFEU prohibits agreements between companies that restrict competition within the EU, including agreements that have the purpose or effect of preventing, restricting, or distorting competition. This can include agreements related to the use or licensing of patents.

National competition laws in the EU member states also include provisions addressing patent misuse. For example, in the United Kingdom, the Competition Act 1998 prohibits anti-competitive agreements and abuse of a dominant market position, including the abuse of intellectual property rights such as patents.

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<sup>24</sup>United States Patent Act, 35 U.S.C. (2021)

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup>Treaty on the Functioning of the European Union, May 9, 2008, O.J. (C 115) 47.

In addition, the European Commission has issued guidelines on the assessment of licensing agreements involving intellectual property rights, including patents. These guidelines provide guidance on how to assess the anti-competitive effects of licensing agreements and how to determine whether such agreements are compatible with EU competition law.

Overall, patent misuse is addressed under a combination of EU and national competition laws, as well as guidelines issued by the European Commission.

## WAY FORWARD TO STOP AND REGULATE PATENT MISUSE

Here are some proposed ways and suggestions through which patent misuse can be properly regulated and hence stopped: -

1. Strengthening Antitrust Laws: Enhancing antitrust regulations and enforcement mechanisms can help deter patent misuse. This includes stricter scrutiny of anti-competitive practices such as patent thickets, strategic acquisitions, and exclusive licensing agreements that stifle competition and hinder innovation.
2. Clearer Definition of Patent Misuse: Introducing a clear and comprehensive definition of patent misuse within the patent laws can provide a solid foundation for identifying and addressing instances of misuse. This definition should encompass practices that harm competition, innovation, and public interest.
3. Mandatory Patent Disclosure: Requiring patent holders to disclose more detailed information about the scope and nature of their inventions can help prevent vague or overbroad patents. This transparency can discourage frivolous litigation and promote a more efficient examination process, reducing the potential for misuse.
4. Limiting Patent Assertion Entities (PAEs): Implementing stricter regulations on patent trolls and non-practicing entities (NPEs) can curtail their ability to engage in abusive litigation tactics. This can involve measures such as requiring PAEs to demonstrate a legitimate business purpose for asserting patents or imposing penalties for bad faith litigation.
5. Promoting Patent Education and Awareness: Increasing public awareness and understanding of patents, their limitations, and the consequences of misuse can empower inventors, start-ups,

and businesses to navigate the patent landscape more effectively. Educational programs and resources can help foster responsible patent practices and discourage misuse.

6. Streamlined Patent Examination Process: Improving the efficiency and quality of patent examination procedures can contribute to preventing patent misuse. A timely and rigorous examination can reduce the likelihood of invalid or overly broad patents being granted, preventing their misuse later on.
7. International Collaboration: Encouraging collaboration and harmonization of patent laws and policies among different jurisdictions can address the challenges posed by cross-border patent misuse. This can involve sharing best practices, aligning standards, and enhancing cooperation in enforcing patent rights while preventing misuse.
8. Patent Policy Review and Reform: Regular review and updating of patent laws and policies to adapt to the evolving technology landscape can help address emerging issues related to patent misuse. Stakeholders, including industry experts, academia, and public interest groups, should be actively involved in this process to ensure balanced and effective reforms.

By implementing these proposed measures, it is possible to create a stronger deterrent against patent misuse while promoting innovation, competition, and public welfare. The collective efforts of policymakers, legal institutions, industry players, and the public are crucial in establishing a patent system that encourages responsible and productive use of intellectual property rights.

## CONCLUSION

In conclusion, the issue of patent misuse in the technology industry is a complex and multifaceted problem that requires careful consideration and examination. This research paper has demonstrated that patent misuse has the potential to stifle innovation, increase market power, and harm consumers. Additionally, it has been shown that patent trolls and other entities may engage in abusive practices that result in significant negative externalities.

Given the complexity of the issue, it is clear that further research is needed to understand the extent of patent misuse and to develop effective policy solutions. Specifically, there is a need for more empirical research that can provide insights into the impact of patent misuse on innovation, competition, and consumer welfare. Furthermore, there is a need for policymakers to explore new

approaches to addressing patent misuse, including the use of antitrust laws, the development of patent pools, and the promotion of open-source technologies. In addition to research and policy interventions, it is also essential to educate stakeholders about the negative consequences of patent misuse. This includes educating policymakers, industry leaders, and the public about the importance of patent rights, but also about the risks of over-restricting access to technologies and stalling innovation.

Overall, the issue of patent misuse in the technology industry is a critical area that requires ongoing attention from scholars, policymakers, and industry stakeholders. It is hoped that this research paper will contribute to a more informed and constructive discussion of this important issue, and help to identify effective solutions that promote innovation, competition, and consumer welfare.

